



BEST PRACTICES

for Representation by
Trial, Appellate, Postconviction,
Habeas, and Clemency Counsel
for Indigent Defendants
in Capital Cases

*The Commission on Appointment
of Counsel in Criminal Cases*

COMMISSION ON APPOINTMENT
OF COUNSEL IN CAPITAL CASES

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PREAMBLE

The Ohio Supreme Court Rules for Appointment of Counsel in Capital Cases (hereinafter “Appt.Coun.R.”) provide that the Commission on Appointment of Counsel in Criminal Cases shall “[p]romulgate best practices for the representation of indigent defendants in capital cases and disseminate those best practices appropriately.” Appt. Coun.R. 2.02(A)(4).

Pursuant to that mandate, the Commission, in consultation with the bar, has memorialized the following best practices to guide attorneys involved in defending indigent defendants in capital cases at all stages of the proceedings in Ohio. These best practices provide direction with respect to particular aspects of practice in capital cases that take into consideration the statutory and rule provisions applicable to capital litigation in Ohio, including, without limitation, Ohio Revised Code Sections 2929.02 through 2929.06, Rule 42 of the Ohio Rules of Criminal Procedure, and Section 11 of the Rules of Practice of the Supreme Court of Ohio.

These best practices do not attempt to be a comprehensive listing of all aspects of competent capital defense. To the contrary, in order to be effective, a practitioner should be familiar with all applicable legal and procedural provisions that apply in any criminal case and should keep abreast of relevant and emerging case law in all aspects of criminal law and procedure, both capital and non-capital. This also includes, but is not limited to, relevant law review articles and research as well as the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

In the end, the objective of these best practices is to contribute to a standard of practice for the defense of capital cases in Ohio that ensures constitutionally adequate legal representation for indigent persons facing the possible imposition or execution of a death sentence. At the same time, the goal of every practitioner must be to provide representation that exceeds any minimal standard – the client and Ohio’s system of justice demands an attorney’s best efforts.

These best practices apply to any case in which there is a reasonable possibility that the prosecutor will contemplate seeking the death penalty, initially or via a superseding indictment. The prosecution decision to seek a capital indictment is oftentimes not apparent at the outset of a case (for example, either at the time of arrest or the issuance of a criminal complaint). Employing these best practices at the onset of a potentially capital case may inform the prosecutor’s decision whether to seek a capital indictment and conserve judicial resources.

Nothing in these best practices diminishes counsel’s obligations to their clients in non-capital cases.

BEST PRACTICES

1. Relationship with the Client

[1.01] Counsel shall make every appropriate effort to establish a relationship of trust with the client and shall maintain close contact with the client. Counsel shall engage in a continuing, interactive dialogue with the client concerning all matters that counsel might reasonably expect to materially impact on the case.

[1.02] Barring exceptional circumstances, counsel shall interview the client within 48 hours of counsel's initial entry into the case. Promptly upon entry into the case, counsel shall communicate in an appropriate manner with the prosecutor, law enforcement agents, and the client regarding protection of the client's rights against self-incrimination, to the effective assistance of counsel, to preservation of the attorney-client privilege, and similar safeguards. Counsel shall re-advise the client regarding these matters as appropriate.

[1.03] Counsel shall engage in a continuing, interactive dialogue with the client concerning all matters that counsel might reasonably expect to have a material impact on the case, such as the progress of and prospects for factual investigation, and what assistance the client might provide to it; current or potential legal issues; the development of a defense theory; presentation of the defense case; potential agreed-upon dispositions of the case; litigation deadlines and the projected schedule of case-related events; and relevant aspects of the client's relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists).

2. Additional Obligations of Counsel Representing a Foreign National

[2.01] Counsel shall make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals. Unless predecessor counsel has already done so, counsel representing a foreign national shall:

- A) Promptly advise the client of their right to communicate with the relevant consular office.
- B) Obtain the consent of the client to contact the consular office. After obtaining consent, counsel shall promptly contact the client's consular office and inform it of the client's detention or arrest. Counsel who is unable to obtain consent shall exercise their best professional judgment under the circumstances.

3. Prior Representation

[3.01] Counsel has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes, at minimum, interviewing prior counsel and members of the defense team and examining the files of prior counsel. Counsel has an independent obligation to ensure that the official record of the proceedings is complete and to supplement it as appropriate.

4. The Duty to Assert Legal Claims

[4.01] Counsel shall identify all potentially available legal claims and thoroughly investigate the basis for each potential claim before deciding whether to assert the claim.

[4.02] Counsel shall evaluate each potential claim in light of:

- A) The unique characteristics of death penalty law and practice.
- B) The near certainty that successor counsel will pursue all available avenues of relief if the client is convicted and sentenced to death.
- C) The importance of protecting the client's rights against later contentions that the claim has been waived, defaulted, not exhausted, or otherwise forfeited.
- D) Any other professionally appropriate costs and benefits to the assertion of the claim.

[4.03] Counsel who decides to assert a legal claim shall present the claim as forcefully as possible, tailoring the presentation to the facts and circumstances in the client's case and the applicable law in the particular jurisdiction. Counsel shall ensure that the court makes a full record of all legal proceedings in connection with the claim.

[4.04] Counsel shall consider the possible advantages to the client of asserting legal claims whose basis has only recently become known or available to counsel and supplementing claims previously made with additional factual or legal information.

5. Sentencing

[5.01] From the beginning of representation, counsel has a duty to investigate issues bearing upon sentencing and to seek information that supports mitigation or rebuts the prosecution's case in aggravation. Counsel shall carefully consider whether counsel can challenge all or part of the aggravating evidence as improper, inaccurate, misleading, or not legally admissible. Counsel shall take advantage of all appropriate opportunities to argue why death should not be imposed. This duty continues to all stages of capital representation, including post-trial proceedings.

6. The Duty to Facilitate the Work of Successor Counsel

[6.01] In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and shall cooperate fully with successor counsel. This duty includes, but is not limited to:

- A) Maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation.
- B) Providing the client's files, as well as information regarding all aspects of the representation, to successor counsel.

- C) Sharing potential further areas of legal and factual research with successor counsel.
- D) Cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.
- E) Preserving the confidentiality of information related to the representation of a client, consistent with Rule 1.6. of the Ohio Rules of Professional Conduct, which includes all members of the successor counsel defense team (e.g., attorneys, investigators, mitigation specialists, etc.).

7. Representation Standards for Lead and Co-Counsel

[7.01] Lead counsel may delegate to other members of the defense team duties imposed by the Rules for the Appointment of Counsel in Capital Cases, these best practices, and prevailing professional norms regarding representation of capital clients, unless the rule specifically imposes the duty on “lead counsel,” or the rule specifically imposes the duty on “all counsel” or “all members of the defense team.”

[7.02] As soon as possible after designation, lead counsel shall assemble a defense team by consulting with co-counsel and selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:

- A) At least one mitigation specialist.
- B) At least one fact investigator.
- C) At least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.
- D) Any other members needed to provide high quality legal representation.

[7.03] All counsel shall, on behalf of the client, demand all resources necessary to provide high quality legal representation. If the court denies such resources, counsel

shall make an adequate record to preserve the issue for review, including, if necessary, an appeal from the trial court's decision to deny counsel the resources necessary to provide high quality representation.

[7.04] All counsel shall seek, receive, and employ the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. Counsel shall have the right to have such services provided by persons independent of law enforcement. Counsel shall protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

8. Investigation

[8.01] All counsel have an obligation to conduct thorough and independent investigations relating to the issues of both guilt or innocence and sentencing. Counsel shall investigate the facts regarding guilt or innocence regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that counsel is not to collect or present evidence bearing upon guilt or innocence. Counsel shall conduct the investigation regarding sentencing regardless of any statement by the client that counsel is not to collect or present evidence bearing upon sentencing. When necessary, counsel should explain counsel's ethical duty to conduct a comprehensive investigation that allows the client and counsel to make informed decisions regarding claims to assert and evidence to present.

9. The Duty to Seek an Agreed-Upon Non-Capital Disposition

[9.01] All counsel are obligated to ensure that all steps are taken that may be appropriate in the exercise of professional judgment and prevailing professional norms in the representation of capital clients to achieve an agreed-

upon non-capital disposition. The duty to seek an agreed-upon non-capital disposition begins upon appointment of trial counsel and continues to execution.

[9.02] Counsel shall explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel shall fully explain the rights the client waives, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, and without limitation, counsel shall know and fully explain to the client:

- A) The maximum sentence that may be imposed for the charged offense(s) and any possible lesser included or alternative offense(s).
- B) Any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in sentencing phase proceedings of other prosecutions of the client as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement, and good-time credits.
- C) The general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements.
- D) The governing legal system, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer.
- E) The types of pleas that may be agreed to, such as a plea of guilty, an Alford plea, or a plea of no contest, or other plea available under the law and criminal procedure of Ohio which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each.
- F) Whether the parties can make any negotiated agreement binding on the court, on penal/parole authorities, and any others who may be involved.

- G) The practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim, and any other persons or entities which may affect the content and likely results of plea negotiations.
- H) Concessions that the client might offer, such as:
- 1) An agreement to waive trial and to plead guilty to specific charges.
 - 2) An agreement to permit a panel of judges to perform functions relative to trial or sentence that would otherwise be performed by a jury, or vice versa.
 - 3) An agreement regarding future custodial status.
 - 4) An agreement to forego in whole or in part legal remedies such as appeals, motions for postconviction relief, and/or parole or clemency applications.
 - 5) An agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity.
 - 6) An agreement to engage in or refrain from any particular conduct or employment, as appropriate to the case.
 - 7) An agreement with the victim's family, which may include matters such as a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution.
 - 8) Agreements respecting actual or potential charges in another jurisdiction.
 - 9) Stipulations.
- I) Benefits the client might obtain from a negotiated settlement, including:
- 1) A guarantee that the death penalty will not be imposed.
 - 2) An agreement between the prosecution, defense, and the court where the court voluntarily agrees to

such agreement and that the defendant will receive a specified sentence.

- 3) An agreement that the prosecutor will not advocate for a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing.
- 4) An agreement that one or more of multiple charges will be reduced or dismissed.
- 5) An agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct.
- 6) An agreement that the client may enter a no-contest plea to preserve the right to further contest certain legal issues.
- 7) An agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement.
- 8) Agreements respecting actual or potential charges in another jurisdiction.

[9.03] Counsel shall keep the client fully informed of any negotiations for a disposition, promptly convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies. Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement along with the advantages, disadvantages, and potential consequences of the agreement. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate shall not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition shall not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

[9.04] Counsel shall not accept any agreed-upon disposition without the client's express authorization. The existence of ongoing negotiations with the prosecution does not in any

way diminish the obligations of defense counsel respecting litigation.

10. Entry of a Plea of Guilty

[10.01] The informed decision whether to enter a plea of guilty lies with the client. Absent a binding commitment to a sentence less than death, trial counsel should be extremely reluctant to advise a client to enter a guilty plea to a capital offense and shall fully advise the client of the risks attendant to such a plea.

[10.02] In the event the client decides to enter a plea of guilty, prior to the entry of the plea, counsel shall:

- A) Make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent.
- B) Ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which they will be exposed by entering the plea.
- C) Explain to the client the nature of the plea hearing and prepare the client for the role the client will play in the hearing, including answering questions in court and providing a statement concerning the offense.

[10.03] During entry of the plea, counsel shall place on the record the full content and conditions of any agreements with the government.

11. Trial Preparation Overall

[11.01] As the defense investigation and accumulation of evidence proceeds, trial counsel shall formulate a defense theory. Counsel shall seek a theory or theories that will be effective in both trial and sentencing.

[11.02] If, at any stage of the case, the court grants the prosecution leave for anyone associated with law enforcement to interview the defendant, defense counsel shall consider what legal challenges counsel may appropriately make to the interview or the conditions surrounding it and the legal and strategic issues implicated by the client's cooperation or non-cooperation. Counsel shall ensure that the client understands the significance of, and risks attendant to, any statements made during such an interview. Counsel shall attend the interview, except as mandated by law.

[11.03] Trial counsel shall request trial phase jury instructions that ensure jurors will be able to consider and give effect to all relevant defense evidence. Trial counsel shall thoroughly review proposed jury instructions prior to the trial court's entertaining objections regarding them. Trial counsel shall object to any instruction and shall offer alternative instructions where appropriate, if the proposed instruction is unfairly prejudicial to the client.

[11.04] Trial counsel shall, at the earliest possible time, determine what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence the prosecutor will offer in support thereof.

12. Jury Selection

[12.01] Counsel shall consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias based on race or gender), whether the court instituted any procedures for selection of juries in capital cases that present legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

[12.02] Counsel shall be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel shall be familiar with techniques:

- A) For exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case.
- B) For uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence.
- C) For rehabilitating jurors who initially indicate opposition to the death penalty.

[12.03] Counsel shall consider seeking expert assistance in the jury selection process.

13. The Defense Case Concerning Mitigation Phase

[13.01] Early in the case, trial counsel shall discuss with the client the sentencing alternatives available and the relationship between the strategy for the mitigation phase and for the trial phase.

[13.02] Prior to the mitigation phase, trial counsel shall discuss with the client the specific mitigation phase procedures of the jurisdiction and advise the client of steps counsel is taking to prepare for the mitigation phase. Counsel shall discuss with the client the content and purpose of the information concerning mitigation that they intend to present, means by which counsel might strengthen the mitigation presentation, and the strategy for rebutting the prosecution's case in aggravation.

[13.03] Counsel shall consider, and discuss with the client, the possible consequences of having the client testify or make an unsworn statement to the jury or three-judge panel hearing the mitigation phase. In determining what to present concerning mitigation, counsel shall consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel shall pursue all appropriate means, including but not limited to litigating pre-mitigation-hearing motions, to ensure that these

considerations do not constrict the defense case concerning mitigation. Counsel shall make a full record in order to support any subsequent challenges.

[13.04] Trial counsel shall request mitigation phase jury instructions that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel shall thoroughly review proposed mitigation phase jury instructions prior to the trial court's entertaining objections regarding them. Trial counsel shall object to any objectionable instruction and shall offer alternative instructions where appropriate.

[13.05] In deciding which witnesses to prepare and evidence to present concerning sentencing, counsel shall consider the following:

- A) Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death.
- B) Expert and lay witnesses, along with supporting documentation, to:
 - 1) Provide medical, psychological, sociological, cultural, or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s).
 - 2) Give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison.
 - 3) Explain possible treatment programs or otherwise support a sentence less than death.
 - 4) Rebut or explain evidence presented by the prosecutor.
 - 5) Witnesses who can testify about the applicable alternative to a death sentence and/or the

conditions under which the alternative sentence would be served.

- C) Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.
- D) Demonstrative evidence, such as photos, videos, and physical objects, and documents that humanize the client or portray the client positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

14. The Official Presentence Report

[14.01] If the court probation office may or will present the court with an official presentence report, counsel shall become familiar with the procedures governing preparation, submission, and verification of the report. In Ohio, the preparation of the report is optional in a capital case. R.C. 2929.03(D)(1). Counsel shall consider the strategic implications of requesting that a report be prepared.

[14.02] If, after carefully considering the potential negative consequences that may flow from an Official Presentence Report, counsel nonetheless decides to request such a report, counsel shall provide to the report preparer information favorable to the client. Counsel shall also decide whether to allow the report preparer to interview the client. Counsel shall ensure that the client understands the significance of, and risks attendant to, any statements made during such an interview. Counsel shall attend the interview.

[14.03] Counsel shall review the completed report, take appropriate steps to ensure the court deletes from the report all improper, incorrect, or misleading information that may harm the client, and take steps to preserve and protect the client's interests where counsel considers information in the presentence report to be improper, inaccurate, or misleading. Counsel shall seek the addition of information favorable to the client, where appropriate.

15. Duties of Trial Counsel at Sentencing Hearing Before Judge

[15.01] All counsel shall prepare for the sentencing hearing before the judge and ensure that the sentencing judge is aware of all appropriate mitigating evidence before imposing sentence.

[15.02] If the mitigation phase jury returned a recommendation of death, counsel shall prepare and present to the sentencing judge mitigating information to support the sentencing court rendering a decision to impose a sentence less than death.

[15.03] All counsel shall seek to minimize the sentencing consequences of the non-capital offenses of conviction. Counsel shall take all reasonable steps to avoid consecutive terms of incarceration. If the defendant is indigent, counsel shall take all reasonable steps to avoid a sentence that imposes a fine or payment of court costs.

16. Duties of Trial Counsel After Conviction

[16.01] Counsel shall be familiar with all state and federal postconviction options available to the client. Trial counsel shall discuss with the client the postconviction procedures that will or may follow imposition of the death sentence. Counsel shall take all actions that maximize the client's ability to obtain postconviction counsel. Counsel shall not cease acting on the client's behalf until successor counsel has entered the case or the court formally terminates counsel's representation. Counsel shall take all appropriate action to ensure that the client obtains direct appeal counsel as soon as possible.

[16.02] Counsel has an obligation to protect the confidentiality of information relating to the representation of a client. *See* Prof.Cond.R. 1.6. "Information relating to the representation of a client" includes, but is broader than, information protected by the attorney-client privilege or the attorney work product doctrine. *Id.* Counsel's obligation to protect confidentiality of information relating to the representation of a client continues even after representation terminates. Counsel shall take every

appropriate step to assert the client's right to confidentiality and shall refrain from disclosing any information relating to the representation of a capital client except as expressly authorized by Prof.Cond.R. 1.6.

17. Duties of Appellate, Postconviction, Habeas, and Clemency Counsel (Successor Counsel)

[17.01] Appellate, Postconviction, Habeas, and Clemency Counsel (collectively: successor counsel) where appropriate and when applicable, shall comply with all of the best practices set forth above.

[17.02] Successor counsel shall seek an interview with prior counsel, review prior counsel's file, and review the entire record of the client's case up to the point of successor counsel's representation. Successor counsel will take all necessary steps to ensure that the case record is accurate and complete, regardless of prior counsel's efforts.

[17.03] Postconviction, Habeas, and Clemency Counsel shall independently investigate the facts of the case and the evidence regarding mitigation. Postconviction, Habeas, and Clemency counsel shall investigate the facts regarding guilt or innocence regardless of the verdict returned at trial, or any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that counsel is not to collect or present evidence bearing upon guilt or innocence.

[17.04] Postconviction, Habeas, and Clemency Counsel shall investigate mitigation evidence/sentencing regardless of any statement by the client that counsel is not to collect or present evidence bearing upon sentencing. When necessary, counsel should explain counsel's ethical duty to conduct a comprehensive investigation that allows the client and counsel to make informed decisions regarding claims to assert and evidence to present.

[17.05] Successor counsel shall be familiar with all state and federal postconviction options available to the client. Trial counsel shall discuss with the client the postconviction

procedures that will or may follow successor counsel's representation. Successor counsel shall take all actions that maximize the client's ability to obtain postconviction, habeas, or clemency relief. Successor counsel shall not cease acting on the client's behalf until new successor counsel has entered the case or the court formally terminates successor counsel's representation. Successor counsel shall take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

[17.06] Successor counsel has an obligation to protect the confidentiality of information relating to the representation of a client. See Prof.Cond.R. 1.6. "Information relating to the representation of a client" includes, but is broader than, information protected by the attorney-client privilege or the attorney work product doctrine. *Id.* Successor Counsel's obligation to protect confidentiality of information relating to the representation of a client continues even after representation terminates. Successor Counsel shall take every appropriate step to assert the client's right to confidentiality and shall refrain from disclosing any information relating to the representation of a capital client except as expressly authorized by Prof.Cond.R. 1.6.

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